No. 84-889

IN THE

Supreme Court of the United States

October Term, 1984

PEOPLE OF THE STATE OF CALIFORNIA and
THE PUBLIC UTILITIES COMMISSION OF
THE STATE OF CALIFORNIA, *et al.*,

Petitioners,

vs.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,

Respondents.

REPLY TO MOTIONS TO DISMISS AND BRIEFS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Preliminary Statement

On December 22, 1982, the Federal Communications Commission (FCC) broke with 50 years of tradition and declared that state regulatory agencies were preempted from ordering depreciation practices which were inconsistent with the methods prescribed by the FCC. *Matter of Amendment of Page 31,* 48 Fed. Reg. 2324 (January 18, 1983). The Commission based its preemption order on two grounds:

(1) Congress had mandated (in the 1934 Communications Act, 47 U.S.C. 220(b)) that it set depreciation for *intrastate* ratemaking purposes; and

(2) Preemption was, in any event, necessary to implement the FCC's policy of promoting competition in the telecommunications industry.[1]

On January 18, 1984, the Court of Appeals for the Fourth Circuit affirmed the FCC's decision by a 2-1 vote. The majority did not address whether the 1934 Communications Act allowed the FCC to set depreciation rates for intrastate ratemaking purposes but nonetheless upheld preemption on the ground that a federal policy would be frustrated. *Virginia State Corporation Commission v. FCC, et al.*, 737 F.2d 388, (4th Cir., 1984).

Respondents' attempt to prevent this Court's review of the vital and far-reaching questions raised by the lower court's decision by arguing that the Fourth Circuit should be upheld on a rationale it refused to embrace; that is, that the Communications Act preempted state regulatory agencies from developing their own depreciation methods for intrastate ratemaking purposes.

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[1] The issue in *this* case is not the propriety of ELG depreciation or the promotion of competition in the telecommunications industry, which many states instituted well before the FCC. [See *Public Service Commission of Wisconsin v. Federal Communications Commission,* Case No. 85-1258 (7th Cir. 1985) which is currently challenging the propriety of ELG.] The actual question for review is whether the FCC can preempt the states on an essential component of intrastate ratemaking.

Our original petition challenged the rationale the Fourth Circuit actually used to preempt. This reply brief will demonstrate (1) the Commission was correct in the *first* 50 years of its history when it read the Communications Act to permit the states to develop depreciation methods for intrastate ratemaking purposes; and (2) there is absolutely no relevant judicial precedent in support of the FCC's erroneous order.

Summary of Argument

The respondents offer three arguments to support their claim that Section 220(b) of the Communications Act authorizes the FCC to preempt intrastate depreciation ratemaking. They are:

(1) Section 220(b)'s predecessor (Interstate Commerce Act Section 20(5)) empowered the ICC to preempt the states' setting of depreciation rates.

This argument is incorrect because while the ICC defended its potential jurisdiction by suggesting that Section 20(5) authorized it to preempt, it never even attempted to do so. In fact, it emphasized that "the great bulk of telephone business is of strictly local concern, and the state commissions are much better informed and equipped than we are to pass upon the conditions surrounding the local service ...". *Depreciation Charges of Telephone Companies,* 118 ICC 295, 374 (1926).

(2) Congress in 1934 refused to retract the ICC's preemptive authority when it rejected a proposed Section 220(j) to the Communications Act which would have expressly prohibited preemption.

This argument is incorrect because the Senate replaced Section 220(j) with Section 152(b)(1), which accomplished the same purpose.

(3) Sections 220(h) and (i) which allow the Commission to excuse compliance with its depreciation orders and require the FCC to consider the "views and recommendations" of the states

before altering depreciation requirements reflect a congressional intent to delegate preemptive powers to the FCC.

This argument is incorrect because the Federal Government in 1934 had neither the resources nor the experience to set depreciation rates for *interstate* plant (78 Cong. Rec. S.4139 (Daily Ed. March 10, 1934)), and therefore Congress directed it §220(i) to rely on the states in setting *interstate* depreciation rates, and, when necessary, to defer to state depreciation ratemaking even for interstate plant (§220(h)). If there is any doubt that the respondents have totally mischaracterized Congress's intent in enacting these provisions, we ask the Court to review the House's original version of the Communication's Act which included Section 220(i) with the original Section 220(j) which explicitly *prohibited* preemption.

The Courts have long recognized that the Communications Act, particularly Section 152(b)(1), preserves the states' exclusive jurisdiction of "charges, classifications, practices, services, facilities, or regulations" relating to intrastate communications. *North Carolina Utilities Commission v. FCC,* 537 F.2d 787 (4th Cir. 1976), *cert. denied* 429 U.S. 1027 (1976). Nonetheless, the respondents in this case, while conceding that nearly all intrastate plant is used also for interstate functions, claim that Section 152(b)(1) protects only the states' jurisdiction of intrastate plant which is not jointly used. This interpretation defies all relevant precedent, the plain language of Section 152(b)(1) and Congress's explicit intent in enacting the Communications Act. Indeed, if adopted by the Court, the respondents' position would render the primary basis for the states' original support of the Communications Act (§152(b)) meaningless.

I. The Plain Language Of Section 220(b) Makes Absolutely No Reference To Intrastate Facilities And Therefore Offers No Evidence Of A Congressional Intent To Preempt State Depreciation Methods Relating Solely To Intrastate Communications.

A. Section 220(b)'s Legislative History Defies The FCC's Claim That It Preempts The State's Development Of Depreciation Methods For Intrastate Plant.

1. Interstate Commerce Act §20(5).

Congress created the Interstate Commerce Commission in 1887 to regulate the interstate transportation of persons or property by rail, road or water. The ICC's jurisdiction was extended to telephone companies in 1910 but, hardpressed by the public demand for railroad reform, the Commission spent little or no time regulating the telephone industry. In fact, since nearly all telephone service was intrastate, all telephone regulation was essentially conducted by the states. 78 Cong. Rec. S.4139 (Daily Ed. Mar. 10, 1934).

With the end of World War I and the termination of federal control of the railroads, Congress enacted the Transportation Act of 1920 which empowered the ICC to set *fixed* interstate rates for the first time. 41 Stat. 485 (1920); *see* Sharfman, *The Interstate Commerce Act,* 197, n.38 (1931). While several sections of the Transportation Act expressly preempted state regulation (*e.g.,* Section 20(a)(7) regarding securities; Section 13(4) concerning discriminatory pricing) the provisions relating to depreciation did not do so. In fact, they made absolutely no reference to intrastate plant or facilities (Section 20(5)).

Indeed, when the ICC was asked to preempt the states and set depreciation methods for intrastate telephone plant, it deferred to the states' expertise, emphasizing that "the great bulk of telephone business is of a strictly local concern, and the state Commissions are much better informed and equipped than we are to pass upon

the conditions surrounding the local service ...". *Depreciation Charges of Telephone Companies,* 118 ICC 295, 374 (1926). It, therefore, directed telephone companies to file proposed depreciation rates not with the ICC but with state regulatory agencies.

2. Communications Act §220(b).

It was against this background, and the public demand for reform of radio broadcast regulation, that Congress in 1934 created the Federal Communications Commission. Approximately 75% of the Communications Act represented a *verbatim* transposition of either the 1927 Radio Act or the Interstate Commerce Act (ICA). See, *Sloan,* Vol. 5 *American Landmark Legislation,* 417, 512 (1977). However, at the insistence of state regulators, specific sections were added to the Act "to safeguard state regulation". 78 Cong. Rec. S. 8882 (Daily Ed. May 15, 1934). Most notably, Section 152(b) was enacted to preserve the states' jurisdiction over intrastate facilities, rates, classifications and services.

B. The Respondents' Reading Of The Communications Act's Statutory Scheme Is Illogical.

Lacking the slightest evidentiary basis in Section 220(b) for their position that the states may not set intrastate depreciation rates, the respondents attempt to weave a thread of preemption with provisions relating to (1) the FCC's ability to excuse compliance with its depreciation and accounting orders (Section 220(h)); and (2) its obligation to notify state Commissions of proposed actions regarding "accounts, records or memoranda" (Section 220(i)) (FCC, 13-14, n.18). In fact, these provisions were enacted to facilitate state guidance in setting *interstate* depreciation charges.

The FCC from its outset has been responsible for the regulation of broadcasting, telegraph and telephone communications. A review of the FCC's annual reports in its early years shows that it was extremely small and, by

its own admission, totally lacked the expertise to set depreciation rates for the telecommunications industry.

As Senator Dill repeatedly stressed, the Federal government in 1934 had no experience in regulating telephone companies:

> The Interstate Commerce Commission has been so busy regulating the railroads that they have not had time to give real consideration to the problems in connection with rate regulation of telephones and telegraphs. It is only in recent years that the communications business has been big enough to demand the attention of those who use it from the standpoint of giving rate regulation. 78 Cong. Rec. S.4139 (Daily Ed. March 10, 1934).

Thus, in directing the FCC to begin setting depreciation rates for *interstate* plant, Congress cautioned the Commission to rely heavily on state regulatory expertise[2]—which it did. 47 U.S.C. §220(i).[3] Moreover, if the Commission was unable to fulfill this responsibility, Section 220(h) allowed it to defer *all* depreciation ratemaking to the states.

The respondents also attempt to draw support for their erroneous reading of Section 220(b) from the Senate's failure to enact the originally proposed Section 220(j). But that analysis ignores the fact that at the same time the Senate modified Section 220(j), as originally proposed by the states, it added Section 152(b)(1) which contained an even broader statement of the preservation of state

[2] It is therefore understandable that the FCC's Annual Reports emphasized the Commission's dependence on the states in setting *interstate* charges. *E.g.*, 1938 FCC Ann. Rep. 32; 1940 FCC Ann. Rep. 34.

[3] If there is any doubt that Section 220(i) did not assume preemption, it should be settled by the fact that the House's original version of the Communications Act included both Section 220(i) and Section 220(j) which explicitly reserved intrastate depreciation for the states. A *fortiori* Section 220(i) cannot be read to assume preemption when accompanied by Section 152(b)(1) (discussed *infra*) which explicitly reserved jurisdiction over *all* intrastate charges, classifications, practices to the states.

authority over intrastate telecommunications. See Hearings on S.2910, 73rd Cong. 2d Sess., pp. 1-2, 12; S. Rep. No. 781, 73rd Cong. 2d Sess. 3, 5 (1934).

During the course of Congressional hearings the states made it clear that they did not insist on the need for the specific language of their proposed Section 220(j). Rather, all they asked was

> for language which will leave the State commissions unhampered as to allowances to be made for depreciation in cases involving intrastate rates. *Hearings on H.R. 8301*, 73d, Cong., 2d Sess. 143 (1934), (Testimony of John Benton, NARUC General Solicitor).

The language of Section 152(b)(1) accomplished that goal, thus leading the states ultimately to support passage of the Act.

C. Respondents' Position that Section 220(b) "Explicitly Directed" The FCC To Preempt State Depreciation Ratemaking Is Belied By 50 Years Of FCC Practice.

The respondents claim that Section 220(b) is an "explicit direction of Congress" for the FCC to preempt the states from developing their own depreciation methods for intrastate ratemaking purposes (GTE, 4). Of course, their argument is belied by the FCC's actions for nearly 50 years when it made absolutely no attempt to set depreciation rates for intrastate facilities and acquiesced in the states' setting of inconsistent intrastate depreciation rates. (See California Petition, fn. 9.) In fact, as indicated, *supra*, the FCC not only limited its depreciation ratemaking to interstate plant (and so informed Congress) (*e.g.* 1940 FCC ANN. REP., 34), but it consistently read Section 220(b) as *not* authorizing its preemption of the states' depreciation practices. As the Commission indicated in its April 7, 1982 order:

> Telephone companies have rarely challenged past state commission departures from accounting or depreciation rules prescribed by this Commission. Such challenges have *not* been successful.... Thus,

AT&T and GTE are asking us to repudiate nearly 40 years of administrative practice and applicable state court precedent by adopting the interpretation of Section 220 that would require an unwilling state commission to follow all depreciation and accounting methods prescribed by this commission (Emphasis added). (California Appendix, pgs. A.46-A.47.)

The FCC's *current* position that Section 220(b) *unequivocally* directed it to preempt the states' *intrastate* depreciation classifications exceeds the bounds of reasonable argument.

II. All Relevant Judicial Precedent Recognizes The States' Exclusive Authority To Determine The Intrastate Rate Treatment Of Intrastate Facilities.

Respondents' second line of attack is that the states' authority to set rates under Section 152(b) has already been abrogated by existing case law. Such an assertion could not be further from the truth.

No prior case has directly reviewed whether Section 152(b) reserves to the states sole control over the setting of rates for intrastate service, including the setting of the elements (depreciation charges) that make up these rates. The cases cited by respondents raise fundamentally different issues and if anything support the petitioners' position in this case. In fact, the court's opinion below, rather than following the cited line of cases, contradicts its own earlier teaching in this area.

The Fourth Circuit's decision ignored its own dicta in *NCUC I* which acknowledged and explained the authority of the states as follows:

"We have no doubt that the provisions of section 2(b) [47 U.S.C. 152(b)1] deprive the [Federal Communications] Commission of regulatory power over local services, facilities and disputes that in their nature and effect are separable from and do not substantially affect the conduct or development of interstate communications ... [R]atemaking typifies those activities of the telephone industry which lend themselves to *practical separation* of the local from the interstate in such a way that local regulation of one does not interfere with national regulation of the other." *NCUC I, supra,* at 793. (emphasis added).

Under the two part test found in this language the FCC cannot preempt unless a state's regulation of intrastate service is (1) inseparable from interstate services, *and* (2) substantially affects the conduct or development of interstate communications.

The inseparability test covered the facts in *NCUC I,* since interconnection of CPE cannot be separated between intrastate and interstate uses. However, it does not extend to depreciation ratemaking which, as evidenced by the FCC's practices since 1934 and acknowledged by the Court below (See 737 F.2d at 396), can be "separated".

In *Computer and Communications Association v. FCC,* 693 F.2d at 215 (*Computer II*) the D.C. Circuit relying on the *NCUC I* tests affirmed the FCC's preemption of all authority over CPE. Just as in *NCUC I,* it was clear that the service in Computer II, provision of CPE, was jurisdictionally inseparable and there was no way other (than through preemption) for the FCC to exercise "its direct authority to determine the regulatory treatment of CPE used for interstate communications." *Computer II, supra* at 215.

In the Fourth Circuit decision at issue the court considered the two parts of the *NCUC I* test in determining whether to affirm FCC preemption of depreciation authority over intrastate service, but made a radical departure from prior cases by treating the two tests as in the alternative and basing its decision *solely* on a "substantial effects" test.[4] The Fourth Circuit by

[4] As pointed out in our initial brief, the FCC readily conceded nine months before rendering its preemption order that no federal purpose was frustrated by the *states'* development of depreciation rates.

abandoning the inseparability test overruled its own prior decisions (*NCUC I* and *North Carolina Utilities Commission v. FCC*, 552 F.2d 1036 (4th Cir., 1977), *cert. denied*, 434 U.S. 876 (1977) (*NCUC II*)) (NCUC II followed the holding of *NCUC I*) and created a conflict with the D.C. Circuit.[5]

Further, the FCC has failed to meet even the second part of the test, that the state prescription of depreciation rates will substantially affect the conduct and development of interstate communications. See California Petition, pgs. 9-12. Therefore, respondents' reliance on this line of cases as dispositive of the issues raised in the Fourth Circuit's decision is misplaced and should be disregarded.

Conclusion

The respondents insist that, notwithstanding the states' alleged "anxious hypotheticals", the FCC's "clearly limited preemption" is based on "well settled points of law" which do not threaten the states' exclusive jurisdiction over intrastate ratemaking (GTE, 19-21). In point of fact, the FCC's decision, by its own admission, goes far beyond its previously recognized authority (California Appendix, A.26-48).

Most importantly, if it is upheld by this Court it will sanction the creation of a new jurisdictional framework which is based not on the language of the Act or its Congressional mandate but rather on the FCC's unsanctioned assertion of jurisdiction.

[5] Moreover, under the Fourth Circuit's latest approach, if the FCC determined that permitting the states to set intrastate rates would be "an impediment to the development of interstate facilities" preemption of that function would be permitted, something all parties concede is prohibited by Section 152(b)(1). Nor does it suffice to argue, as respondents do, that such an issue will be dealt with when the need arises. Rather, it is incumbent upon respondents to explain *now* why the setting of depreciation methods is not a "charge, classification, practice, service . . . or regulation" under the terms of Section 152(b)(1). Having failed to do so, the respondents are effectively arguing that Section 152(b)(1) should be ignored.

Respectfully submitted,

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